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Discussion on the special theme for the year, "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples"

Report on indigenous fishing rights in the seas with case studies from Australia and Norway[1]

Summary

At its eighth session, in May 2009, the Permanent Forum appointed Carsten Smith and Michael Dodson, members of the Permanent Forum, as special rapporteurs to prepare a study on indigenous fishing rights in the seas, and requested that the report be submitted to the Permanent Forum at its ninth session, in April 2010. The study includes an analysis of the potential protection of indigenous fishing rights in the seas provided by the existing international framework, including the United Nations Declaration on the Rights of Indigenous Peoples, article 27 of the International Covenant on Civil and Political Rights, International Labour Organization Convention No. 169 and *Apirana Mahuika et al. versus New Zealand*. Case studies from Australia and Norway, with reference to conventions and States in those two respective regions (vis. Papua New Guinea in relation to the Torres Strait Treaty; Sweden and Finland in relation to the Nordic Saami Convention), are presented to enable comparison between these States and with international law.

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I. Introduction

1. The subject of the present paper is the rights of indigenous peoples living in the coastal States around the world to exercise a right to fish in the seas and in waters adjoining them (such as bays, estuaries and fiords). The main issue is whether and to what extent indigenous peoples have the right to a preferred position, either as an exclusive right in certain areas or as a priority in decision-making, for instance, when stipulating fishing quotas in sea fisheries. There is also the question of indigenous participation in the State regulation of public and commercial fishers and fisheries. The paper discusses the relevant international law and describes the national law of Australia and Norway, both with large interests in fisheries, and ends by inviting comparison with international law standards.

2. The words "sea" and "fishing" may have meanings beyond those initially apparent. Jurisdictional context and legal instruments — within a State, between States (regionally or in treaty relationships), and under accepted international norms — influence their complex, sometimes simultaneous meanings.

3. The special rapporteurs recognize the conceptual, practical and legal issues surrounding terminology commonly employed to delineate marine boundaries and focus on "seas" by examining coastal bodies of water adjoining Australia and Norway and associated areas (seabeds, foreshores, estuaries, bays, fiords). Non-indigenous terms are used in both domestic and international contexts, but by reference to indigenous understandings and categories in order to allude to difference or incommensurability in epistemologies.

II. International framework

4. There have been strong developments in international law regarding indigenous peoples in recent decades. A principal issue is indigenous peoples' rights to natural resources. For indigenous peoples living along coastlines, fishing and other uses of the ocean have been their main livelihood and the material basis for their culture. There are no rules or principles in international law dealing specifically with indigenous rights to salt sea fishing. The legal position of coastal indigenous peoples must be derived from more general instruments. The two main conventions of relevance are the International Covenant on Civil and Political Rights and the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169). The present paper considers to some extent these conventions with a view to their impact on uses of resources by indigenous peoples in the areas where they live and have traditionally developed their coastal indigenous culture.

5. The use of the ocean through centuries, especially the near coastal waters with adjoining bodies such as bays, estuaries and fiords, has had an instrumental effect in creating various coastal indigenous peoples' cultures. In the period since the Universal Declaration of Human Rights, these cultures have been protected by the evolution of international law instruments. The combination of these historic circumstances of indigenous peoples' longstanding traditional coastal usage and the development of influential international law instruments protecting indigenous and minority cultures together constitute the foundation for the rights of indigenous peoples.

A. United Nations Declaration on the Rights of Indigenous Peoples

6. The Declaration includes several articles of relevance to the rights of indigenous peoples to natural resources. First, there is the main principle in article 3 stating:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

7. The Declaration also expresses more specific rules on rights to natural resources. States shall, according to article 8, paragraph 2, provide effective mechanisms for prevention of "any action which has the aim or effect of dispossessing them of their lands, territories or resources"; article 20, paragraph 1, states that indigenous peoples have the right to be secure in "the enjoyment of their own means of subsistence and development" and to engage freely in "all their traditional and other economic activities"; while article 26, paragraph 2, establishes the right for indigenous peoples to own, use, develop and control "lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use".

8. This instrument is not a treaty and, accordingly, it does not have the binding force of a treaty. However, the adoption of any human rights instrument by the United Nations aspires to some legal effect. Article 42 of the Declaration lays down a new function for the Permanent Forum: to promote the "full application" of the provisions of this Declaration and "follow up [its] effectiveness".

B. Article 27 of the International Covenant on Civil and Political Rights

Rights of indigenous peoples and of minorities

9. Ethnic minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture, under article 27 of the Covenant. Although article 27 is expressed in negative terms it nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation.[2]

10. The United Nations Declaration on the Rights of Indigenous Peoples is the most universal, comprehensive and fundamental instrument on indigenous peoples' rights and forms part of universal human rights law. The basic principles of the Declaration are identical to those of the main human rights covenants and a number of its articles are identical to those of other binding human rights instruments.[3] Indigenous peoples may rely both on the Declaration and on convention-based rules originally intended for ethnic minorities.

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[2] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40* (A/49/40), vol. I, annex V, general comment No. 23, para. 6.

[3] See *Official Records of the Economic and Social Council, 2009, Supplement No. 23*, annex, paras. 6-13.

11. The Human Rights Committee has stated that there is a clear relationship between article 27 and indigenous peoples. Various aspects of the rights of individuals protected under that article — for example, the right to enjoy a particular culture — may apply to ways of life which are closely associated with territory and the use of its resources, which the Committee states "may particularly be true of members of indigenous communities constituting a minority".[4] The relationship is further emphasized in the following statement of the Committee:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples.[5]

Material basis of culture

12. Whether article 27 includes a right to natural resources depends on the meaning of the concept of "culture" in the provision. If this concept may be understood to include the material — that is, economic and physical — bases of the culture of an ethnic minority, then the provision will encompass the use of resources and rights to land and water, such as the right to ocean fishing. General comment 23 (1994) of the Human Rights Committee points in this direction in interpreting the rights protected under article 27: "That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law".[6]

13. There is interconnectedness between the right to the material foundation of culture and the right to special measures. The right to the material foundation of culture will imply recognition of a preferred position for indigenous peoples vis-à-vis other citizens. A right to fishing to a sufficient degree for sustaining the material foundation of an indigenous people's culture might necessitate reducing legal fishing quotas of non-indigenous fishers or perhaps the reservation of certain areas for the exclusive use of Indigenous peoples. A crucial point in this discussion is whether article 27 includes a right to special measures.

14. General comment 23 states that positive measures of protection are "required" in order to ensure that the rights according to article 27 are protected.[7] Moreover, the Committee is very clear in this regard and emphasizes the use of positive measures, saying that although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture:

> Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture ... in community with the other members of the group.[8]

15. This attitude to positive measures is furthermore underlined in connection with the statement cited above on fishing and hunting, where the Committee adds:

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[4] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40* (A/49/40), vol. I, annex V, general comment No. 23, para. 3.2.

[5] Ibid., para. 7.

[6] Ibid.

[7] Ibid., para. 6.1.

[8] Ibid., para. 6.2.

> The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[9]

16. In its conclusion, the Committee points out that the protection of rights according to article 27 imposes specific obligations on States parties, and that the protection of these rights has the perspective of being "directed towards ensuring the survival and continued development of the cultural ... identity of the minorities concerned, thus enriching the fabric of society as a whole".[10]

C. Jurisprudence — *Apirana Mahuika et al. versus New Zealand*

17. There is also jurisprudential support for these readings regarding the basis of material culture and positive measures. In *Lubicon Lake Band v Canada* (1990), the Committee recognizes that

> the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.[11]

18. *Apirana Mahuika et al. versus New Zealand* (2000) is of special relevance to the present paper because it is central to several of the issues concerning indigenous rights to ocean fisheries. In 1840 Maori and the British Crown signed the Treaty of Waitangi, which affirmed the rights of Maori, including the right to the "full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess". No attempt was made to determine the extent of the fisheries until the 1980s, when inland fisheries were overexploited whereby the State then placed a moratorium on issuing new permits and removed part-time fishers from the industry. This measure had the unintended effect of removing many of the Maori fishers from the commercial industry. Since the efforts to manage the commercial fishery fell short of what was needed, in 1986 the State introduced a quota management system. In 1988, the State started negotiations with Maori, which led in August 1992 to a Memorandum of Understanding. The Maori negotiators sought a mandate from Maori the deal outlined in this memorandum, and the negotiators' report showed that 50 *iwi* (tribes) comprising more than 200,000 Maori supported the settlement. On the basis of that report, a Deed of Settlement was executed in September 1992 by the New Zealand Government and Maori representatives, signed by 110 signatories. Thereafter the Treaty of Waitangi (Fisheries Claims) Settlement Act was adopted the same year. The authors — a group of 19 individual Maori — claim that the Act confiscates their fishing resources, denies them their right to freely determine their political status and interferes with their right to freely pursue their economic, social and cultural development. The Committee stated the principle of the material foundation of culture at the outset:

> It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control

[9] Ibid., para. 7.

[10] Ibid., para. 9.

[11] Ibid., *Forty-fifth Session, Supplement No. 40* (A/45/40), vol. II, annex IX, sect. A, para. 32.2, communication No. 167/1984, 26 March 1990.

> of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community.[12]

19. This is the basis and legal starting point for their further opinion. The right to enjoy one's culture, the Committee said, cannot be determined *in abstracto* but must — like other legal principles — be placed in context. In this case the Committee addressed a more general issue of our times, stating:

> In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology. In this case the legislation introduced by the State affects, in various ways, the possibilities for Maori to engage in commercial and non-commercial fishing. The question is whether this constitutes a denial of rights.[13]

20. In order to solve this question, the Committee recalls its General Comment on article 27, according to which, especially in the case of Indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them. With this background, the Committee acknowledges that the Treaty of Waitangi (Fisheries Settlement) Act 1992 and its mechanisms "limit the rights of the authors to enjoy their own culture". This is the main conclusion of the Committee's reasoning. The rights according to article 27 were limited. Such limitation would normally have amounted to a breach of the convention.

21. However, the opportunity of the minority to take part in decision-making processes may influence this decision. The Committee has in its case law

> emphasized that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depending on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.
>
> ... [With regard to the facts of this case the Committee notes that] the state party undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. The Settlement was enacted only following the Maori representatives' report that substantial Maori support for the Settlement existed. For many Maori, the Act was an acceptable settlement of their claims.[14]

22. As to the effects of the agreement, the Committee notes that both in regard to commercial fisheries and non-commercial fisheries the Maori got satisfactory results. In regard to commercial fisheries, the effect of the Settlement was

> that Maori authority and traditional methods of control as recognized in the Treaty were replaced by a new control structure, in an entity in which Maori

[12] CCPR/C/70/D/547/1993, para. 9.3.
[13] Ibid., para. 9.4.
[14] Ibid., para. 9.5.

share not only the role of safeguarding their interests in fisheries but also the effective control.[15]

23. In regard to non-commercial fisheries "the Crown obligations under the Treaty of Waitangi continue, and regulations are made recognizing and providing for customary food gathering". The decision strongly supports the view that article 27 of the Covenant protects the right to fish when this is an essential part of the culture of an ethnic minority. Moreover, the authoritative interpretation of the article by the Human Rights Committee, both in its General Comments and individual cases, corroborates this construction of the article.

D. International Labour Organization Convention No. 169

24. This convention concerning indigenous and tribal peoples in independent countries includes several provisions relevant to indigenous rights to sea fisheries. They are first of all of a procedural character. The controlling organ of ILO has declared that "the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all of its provisions are based". The most important of the provisions which constitute this "cornerstone", article 6, makes it a duty for governments to consult the peoples concerned through appropriate procedures, to establish means by which these peoples can freely participate, and to establish means for the full development of these peoples' own institutions and initiatives. These rules are supplemented by article 7 of the Convention and actively applied in ILO practices.

25. Whereas those articles are general provisions on consultation and participation, article 15, paragraph 1, is directly linked to natural resources. The first sentence lays down that the rights of the peoples concerned to safeguard the natural resources pertaining to their lands. It thus supports the Covenant's protection of the material basis of culture. The second sentence points directly to procedural requirements: "(t)hese rights include the right of these peoples to participate in the use, management and conservation of these resources".

26. There was discussion in the making of the convention regarding whether articles concerning 'land' should apply to sea territories. The result was that the central article 14 on rights of ownership and possession of the peoples concerned over lands which they traditionally occupy should be confined to lands (including inland rivers and lakes but not salt sea). In article 15, on the other hand, the concept of "lands" should be understood as having wider meaning, which was expressed in a legal definition in article 13, paragraph 2, stating that: "[t]he use of the term *lands* in articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use". On this ground, the provisions laid down in article 15 shall embrace offshore sea areas that indigenous people use, and thus is applicable with regard to their coastal fisheries. The most important result will be the right to participation in state regulation of quota management, the size of vessels in various sectors of the sea, and the use of fishing equipment.

[15] Ibid., para. 9.7.

III. Case study: Aboriginal and Torres Strait Islander peoples' fishing rights in Australia's offshore waters

27. The present section begins with a brief reference to Australian indigenous perceptions of "sea country", which is ultimately the source of the Australian indigenous relationship to offshore waters, only parts of which have been declared capable of recognition under the Australian legal system. Australian indigenous legal rights and interests relevant to offshore waters are introduced by outlining selected relevant principles of native title and examining jurisprudence in this area. Then, an overview of the division of power between the commonwealth, State and territory levels of government constitutes a precursor to a discussion of other non-native title statutory regimes relating to indigenous offshore fishing rights, including cultural heritage and fisheries management legislation. The Torres Strait Treaty between Australia and Papua New Guinea is also alluded to.

A. Australian indigenous perspectives of sea country

28. Indigenous Australians have a long history of close association with the sea and its resources for subsistence, economic livelihood, spirituality and cultural identity. These connections are well supported by archaeological and anthropological evidence.[16] Indigenous peoples do not distinguish between landscape and seascape, both being equally part of country. This contrasts markedly with the worldview reflected in the Australian legal system, which perceives boundaries where indigenous conceptualizations provide a geographically integrated understanding of land, rivers, estuaries, beaches, reefs, seas, cays, seabeds and associated flora and fauna. Sites of significance and dreaming tracks extend to offshore waters, flora and fauna and form part of the system of traditional law and custom connecting indigenous Australians to sea country.

B. Jurisprudence — native title offshore

29. Indigenous rights and interests in Australian lands and waters predated and survived the imposition of British sovereignty. This was recognized by the High Court of Australia in 1992 through the recognition of native title in *Mabo v Queensland* (No. 2)[17] (the *Mer Island* case). Although the *Mer Island* case itself originally included offshore areas, these were later excised from the claim.

30. Since then, a complex legislative system has taken precedence in defining the framework regulating the field of native title law. Nonetheless, litigation from the Federal and High Courts remains highly relevant to the development and definition of native title law and this jurisprudence therefore merits an examination in relation to native title rights and interests offshore, for numerous reasons: the main statute, the Native Title Act 1993 (Cth), requires that the rights and interests claimed be capable of recognition under the common law in section 223(1)(c); case law also

[16] Archaeological records indicate an Indigenous association with and reliance on coastal and marine resources dating to at least 30,000 years ago: G. D. Meyers, M. O'Dell, G. Wright, S. C. Muller, *A Sea Change in Land Rights Law: The Extension of Native Title to Australia's Offshore Areas*, Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996.

[17] (1992) 175 CLR 1.

continues to provide interpretive guidance complementing the reading of the legislation in general; and finally, there is a persuasive body of judicial and academic commentary contrasting the common law concept of communal native title to statutory native title rights and interests. For these reasons, this section presents only a brief snapshot of selected sections of the Native Title Act before concentrating on recent significant cases raising the issue of indigenous rights offshore under native title, with occasional reference to native title legislation where necessary. The focus is therefore on case law, with legislation examined only where directly relevant to jurisprudence. Overwhelmingly, the native title jurisprudence reveals a trend of recognizing indigenous fishing rights offshore as non-exclusive, non-commercial interests' subject also to the common law public right to fish and the international right of innocent passage.

31. Consent determinations are another important source of information on contractual indigenous rights and interests in lands and waters. These agreements are increasingly being entered into in lieu of litigation and sometimes even following litigation, using a favourable judgment as leverage for negotiation. They are outside the scope of discussion of this paper.

Native Title Act 1993 (Cth)

32. Section 223(2) of the Native Title Act specifically includes fishing rights as capable of falling within native title interests. Section 253(a), (b) and (c) define waters and encompass offshore areas such as seas, including those over which Australia asserts sovereign rights under the Seas and Submerged Lands Act 1973, as per section 6 of the Native Title Act. Tidal inlets, bays, estuaries, harbours or subterranean waters and the beds or subsoil under them or the shore are other waters that are included, and intertidal zones are also considered to be waters, rather than land. While the Native Title Act does not treat sea country claims differently to those over land, section 212(1) protects existing Crown ownership in natural resources, in the control and regulation of water flow and, via section 212(2), the existing public access to and enjoyment of various offshore waters (e.g., beds, banks, or foreshores, coastal waters and beaches).

Commonwealth v Yarmirr[18]

33. In Australian native title law to date, there has been no recognition of exclusive or commercial Indigenous rights to sea country. Indeed, until the *Croker Island* case in 2001, which dealt solely with native title rights over sea country, there was no determination of any form of native title offshore; while the Native Title Act provides for recognizing rights and interests in lands and waters, this is the first successful case determining that both the Act and the common law are capable of recognizing native title offshore. The landmark case of *Croker Island* has subsequently been confirmed.

34. Native title is subject to rights under other Commonwealth and State laws allowing, for instance, recreational and commercial fishing and shipping in native title areas. Native title rights also yield to interests validly conferred by the Crown. Also at issue in *Croker Island* was the relationship between native title and various other rights such as the common law public right to navigate and fish in offshore

[18] (2001) 184 ALR 113; [2001] HCA 56. Hereafter: the *Croker Island* case.

waters and the international right of innocent passage of ships through Australia's territorial sea. The extent of the common law's jurisdiction was questioned (specifically, whether this is measured at the time of the imposition of British sovereignty), with the result that the Court held the common law extends below the low watermark but not into the high seas. (The *Yarmirr* case suggests the possibility of native title extending beyond the 3 nautical miles limit.) Accordingly, the common law public rights to navigate and fish in offshore waters (as well as the international right of innocent passage) were held to encumber native title. The majority reasoned that the encumbered native title rights could amount only to non-exclusive interests being capable of existing without fatal inconsistency. The Court classified the native title right as non-exclusive because it viewed exclusive native title rights as so inconsistent with the other common law public and international rights (which must prevail in any conflict with native title) that native title would have had to have been extinguished had it not been classified so. Accordingly, only selected native title interests or rights to engage in specific activities established on the facts were granted by the Court, which emphasized the non-exclusive, possessory nature of native title as a bundle of rights and interests. In contrast to the majority view, Justice Kirby (in dissent on the High Court) and Justice Merkel (in dissent in the Full Federal Court) both considered that residual exclusive native title rights of control and use could be granted in the form of an exception in favour of the common law public right to fish and navigate and the international right of innocent passage.

Lardil Peoples v State of Queensland[19]

35. Since *Croker Island*, various cases have extended the recognition of native title along Australia's coastline and over its seas and seabed. The *Wellesley Islands* case in 2004 provided useful guidance on how and in what form native title is recognized below the high watermark. The areas where native title was found were in the intertidal zones and adjoining seas for a distance of 5 nautical miles offshore from the islands which had been inhabited at sovereignty, 0.5 nautical miles around other islands uninhabited at sovereignty, and a distance ranging from 2.7-5 nautical miles off the mainland coast. Affirming the reasoning in *Croker Island*, this case also recognized non-exclusive, non-commercial native title rights over parts of the areas claimed, finding the continued existence of native title rights of control of access and use in the waters and submerged lands of the intertidal zone and territorial seas impossible without fatal inconsistency with common law public and international law rights.

36. In practice, non-commercial and non-exclusive offshore native title rights entail native title holders being unable to influence or have recourse against activities conducted in their sea country (including major natural resource developments such as commercial fishing and petroleum exploration), where such activities involve the exercise of the public or international rights recognized at common law and international law, or where such activities are sanctioned by licences or authorities granted under legislation. As commentators note, from a commercial point of view (putting aside social and spiritual benefits and the possibility of unquantified bargaining value), this renders offshore native title rights of little monetary value. It would therefore require only minimal compensation to indigenous Australians for impairment or extinguishment of their offshore native title rights.

[19] [2004] FCA 298. Hereafter: the *Wellesley Islands* case.

Gumana v Northern Territory of Australia[20]

37. The *Blue Mud Bay* native title case in 2007 involved claim areas over both land and offshore waters. The Court in this case recognized the Yolgnu people's non-exclusive right to the intertidal zones and adjacent sea areas claimed. In relation to the intertidal zone, a question was raised as to the classification of bodies of water affected by the "arms of the sea" (i.e., rivers, streams, estuaries), especially if they are not navigable. The Court found that even in non-navigable waters, the common law public right to fish would be exercisable in the entire intertidal zone, which includes tidal waters (i.e., waters affected by the "arms of the sea").

38. The non-commercial and non-exclusive nature of intertidal and offshore native title rights was confirmed again when the judge found himself unable to recognize the Yolgnu people's right to protect sites of religious, spiritual or cultural significance because he saw this as being in irresolvable conflict with the common law public right to fish and navigate, considering that protection would necessarily require exclusion of access by others. Any rights to use the intertidal and offshore waters for commercial purposes traditionally held under indigenous law and custom could not be recognized by the common law and, his Honour contended, should not be the subject of a determination. Consistent with previous cases such as *Croker Island* and *Wellesley Islands*, native title in these areas was held in the *Blue Mud Bay* case to also yield to the rights of commercial and recreational fishers or any validly created interests from the Crown.

Federal Court Case number QUD 6040 2001, unreported: known as the *Torres Strait Regional Seas* case[21]

39. The Torres Strait is the body of water between Australia and Papua New Guinea where the Pacific and Indian Oceans meet and where there are 133 islands, sandy cays and rocky outcrops of which 38 are inhabited. The Torres Strait waters and islands cover approximately 49,000 square kilometres. This region is unique in native title law in two respects: it is home to Australia's Torres Strait Islander indigenous peoples who are culturally distinct from mainland Aboriginal peoples, and it is the subject of an international treaty, the Torres Strait Treaty.[22] Native title was first recognized in this region at Murray Island in the *Mer Island* case. As previously mentioned, this did not involve offshore rights, but rights to land. Since

[20] [2007] FCAFC 23. Hereafter: the *Blue Mud Bay* native title case. See also J. Selway, The "Blue Mud Decision" *Gumana v Northern Territory of Australia* [2005] FCA 50, 2005; and *Gumana v Northern Territory* (2005) 141 FCA 457. An associated issue in this case was heard separately on appeal in *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 and is discussed below in relation to non-native title indigenous interests in the form of statutory grants under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), hereafter referred to as the *Blue Mud Bay* land rights case. See also High Court decision — *Northern Territory of Australia v Arnhemland Aboriginal Land Trust* (2008) 236 CLR 24.

[21] *Naghir People No.1 v Queensland* [2008] FCA 192 (21 February 2008) Native Title number NT QC01/42, Federal Court number QUD6040/2001, unreported. Hereafter: the *Torres Strait Regional Seas* case.

[22] The Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters [1985] ATS 4, made on 18 December 1978 and entered into force on 15 February 1985. See also United Nations *Treaty Series*, vol. 1429, No. 24238.

then, however, there have been native title consent determinations over all community islands in the Torres Strait.

40. The *Torres Strait Regional Seas* case, covering approximately 34,800 square kilometres, commenced hearing in the Federal Court in 2008 and the trial concluded on 24 July 2009 and judgment is presently reserved at the date of writing the present paper. It involves Papua New Guinea respondents who have asserted their traditional ties with the people and areas of Torres Strait, including assertions that some are of traditional inhabitants of Torres Strait descent despite residing in Papua New Guinea. Status, jurisdiction and standing are naturally therefore relevant issues to be brought before the Court. Exclusive native title is not asserted over the entire claim area. Considerations of international law of the sea are particularly relevant given that the claim encompasses areas beyond Australia's territorial sea.

Native title as a shield

41. Native title can provide a successful defence to the imposition of statutory penalties for breaching provisions governing hunting and removing various fauna (such as crocodiles or fish) for personal consumption, under traditional law and customary practice.[23]

C. Statutory rights and interests offshore aside from native title

42. A significant proportion of Australian fisheries production is exported, including valuable products such as rock lobster, pearls, abalone and tuna. There are numerous statutory regimes which supplement the legislative scheme established under the Native Title Act. The scope of the present paper allows only a brief overview of these management arrangements potentially affecting Indigenous fishing rights in offshore waters.

Fisheries management

43. Fisheries legislation extends up to 200 nautical miles from the coast and, in limited form, further beyond into the high seas. Australia's federal Constitution, via section 51(x), vests exclusive authority to control Australian fisheries in the Commonwealth which possesses the power to control all activity in its territorial waters from the coastline to its internationally recognized territorial sea and seabed, because colonial or State and territory boundaries historically ended at the low watermark.[24] Notwithstanding, owing to extensive negotiations between the Commonwealth and States and territories, jurisdiction over fisheries is now shared through a network of Commonwealth legislation and corresponding State and

[23] See *Mason v Tritton* (1994) 32 NSWLR 572 especially Kirby J. at 582 and *Dillon v Davies* [1998] TASSC (20 May 1998) for cases involving abalone; *Derschaw anors v Sutton, Full Court, Supreme Court of Western Australia*, unreported 16 August 1996; *Underwood v Gayfer* [1999] WASCA 56 (15 June 1999) for fishing with nets during seasonal closure; *Wilkes v Johnsen* [1999] WASC 74 (23 June 1999) for taking undersized freshwater crayfish (section 211 Native Title Act applied to the Fish Resources Management Act 1994); and *Yanner v Eaton* [1999] HCA 53 (7 October 1999) regarding hunting and removing estuarine crocodiles for personal consumption contrary to the Fauna Conservation Act 1974 (Qld).

[24] See *New South Wales v The Commonwealth* (1975) 135 CLR 337, otherwise known as the *Seas and Submerged Lands Act* case.

territory legislation. The Offshore Constitutional Settlement employed section 51(xxxviii) of the Constitution to return jurisdiction over the sea and seabed from the low watermark to 3 nautical miles offshore to States and territories, which also retained jurisdiction over recreational fishing to 200 nautical miles and possibly beyond. Current expansive High Court interpretations of section 51(xxix) suggest the Constitution's external affairs power generally supports the validity of federal laws operating well beyond low watermark.

Protection of cultural heritage

44. Although conceptually nearly inseparable from native title, cultural heritage can also encompass much wider notions than sites of significance and it is accordingly subject to separate legislative arrangements. Nonetheless, cultural heritage matters do frequently overlap with native title interests in land and waters and sometimes with land rights. Native title determinations that are litigated often produce rights and interests that fail to recognize the strong proprietary rights and customary indigenous governance institutions relating to management and protection of cultural heritage.

Land rights

45. Decades before the recognition of native title in 1992, some indigenous-specific proprietary interests existed by virtue of legislative provision in land rights regimes. These Crown grants of title remain distinct from native title interests in land which derive from common law recognition of indigenous traditional law and custom concerning lands and waters. "Land rights", on the other hand, is a term that refers to a variety of statutory grants under different conditions, capable of a variety of legal remedies (in some instance, compensation) for interference with the interest. Title is usually communally held by a group rather than by individuals, and there are usually restrictions on alienating and dealing with the title.

46. The High Court recently decided on a land rights case involving competing interests created under statutory permits for non-indigenous fishers on land that was the subject of a statutory grant of indigenous land rights title under the Fisheries Act (Northern Territory).[25] The Court held that despite obtaining a permit, non-indigenous fishers still required permission from the indigenous peoples to enter and fish on their land because the indigenous statutory land grant constituted an exclusive right to fish in intertidal waters (coastline and river mouths). This decision held the public rights to fish and navigate had been abrogated in the granted area.

D. Torres Strait Treaty

47. This treaty between Australia and Papua New Guinea entered into force in 1985 and recognizes indigenous offshore rights to fish. It establishes a protected zone to safeguard traditional ways of life and livelihoods of traditional inhabitants,

[25] *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 split 5:2 Gleeson CJ, Gummow, Hayne and Crennan JJ, Kirby, J agreeing; Kiefal and Heydon JJ dissenting (30 July 2008). Under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), the relevant land council for that area of Aboriginal land is the Northern Land Council, the relevant body to grant permission to enter and fish.

like fishing and free movement rights. "Traditional" is construed liberally to include modern adaptations of traditions, including in fishing methods. As its name suggests, the treaty applies to Torres Strait Islander people but not to Australia's other indigenous group, Aboriginal people, some of whom also live along the coastline and have traditional links with offshore marine areas. The treaty was recently the subject of a parliamentary inquiry by the Senate Foreign Affairs, Defence and Trade Committee, which has not yet reported to Parliament.[26]

IV. Case study: Saami people's fishing rights in Norway's offshore waters

A. Norwegian fishing regulation and its effect on coastal Saami

48. Norway has a very long coastline with a vast number of fiords. Fishing is, next to oil and gas industries in recent years, the country's main trade.[27] The indigenous people of Norway, the Saami people, have for centuries lived along the country's northern coastline.[28] The most well-known fact in literature about the Saami people is their reindeer-herding, with herding families moving with their flocks nomadically from inland during winter to the coast in summer. However, fishing has always been the main livelihood for the many Saami living permanently in seaside areas. They have largely combined fishing with some farming, hunting and gathering from inland areas. Saami fishing has therefore very much been, and still is, a small-scale activity in the fiords and the near-coastal waters, in comparison with the large and capital-demanding fishing vessels transforming the fishing industry these last decades.

New regulation regime

49. State regulation of sea fisheries underwent drastic change in the late 1980s when quotas of cod were introduced as a consequence of necessary reductions of the total allowable catch.[29] The regulation linked quotas to vessels and not to fishers. These quotas were distributed on the basis of the amount of the catch in previous years, resulting in small vessels in Saami districts to a large degree falling outside the new quota system. This negative consequence for Saami areas was exacerbated by a seal invasion, further reducing the possibility of fishing in fiords and coastal seas in those areas during the years used for counting the historic catch as the basis for quotas. These newly calculated quotas were distributed free of cost to owners of vessels with a sufficient historic catch. In the years that followed, authorities allowed quotas to attach to vessels at the point of sale, and it successively became a market where the price of vessels with a quota can be much higher than the market value of the vessel itself. A certain group of the total allowable catch was established for fishers without quotas. However, those who wished to take part in the fisheries based on a full ordinary quota had to buy a vessel with a quota linked

[26] See http://www.aph.gov.au/senate/committee/fadt_ctte/torresstrait/index.htm.

[27] For description and analysis with special reference to fishing rights in the seas, see Norway's Official Reports (NOU) 2008:5.

[28] Ibid., chaps. 5 and 6.

[29] Ibid., chap. 3.

to it. For the newcomers, including recruitment from the next generation, they had to be able to invest considerable capital in order to join this trade.

50. This development for Saami fishing communities was considered substantially unjust. After a new statutory regulation based on ILO Convention No.169 for the land area of the core Saami districts in Finnmark (the most northern county of Norway), a Coastal Fishing Committee was appointed in 2006 to undertake research and make recommendations regarding Saami demands for rights to fish in the ocean north of Finnmark. The Committee concluded in 2008 that Saami living in fiords and along the coast of Finnmark do have rights to fish which are based on their historical use and rules of international law regarding indigenous peoples and minorities.[30] There is now an ongoing legal and political discussion based on this conclusion. The work of the Committee has not yet come to Parliament, so the discussion is still alive in Norway and may yet capture international interest.

Legal reasoning of the Coastal Fishing Committee (Kystfiskeutvalget)

51. The implication of article 27 on the rights of the Saami has been in the foreground of the legal and political debate since the early 1980s. One should therefore examine the main points of this evolving discussion. In a 1984 report, a Saami Rights Committee (Samerettsutvalget) thoroughly analysed whether this article embraces the material basis of Saami culture as capable of protection.[31] The Committee also considered in this context the legal material concerning the protection of indigenous peoples. Even though the law on indigenous peoples does not concern ethnic minorities more generally, one should interpret article 27 with a view to the needs of each particular minority. When a specific ethnic minority stands in need of a certain cultural basis, and they are deprived of this basis, in reality they lose the possibility to enjoy their culture. This consequence implies that each ethnic minority may require the necessary real foundation which is crucial for the enjoyment of their particular culture. Saami people, as with other indigenous peoples, are an ethnic minority that to a considerable degree has its cultural basis in a traditional use of natural resources. The conclusion of the Committee was thus in principle positive with regard to protection of the material cultural basis, however, uncertain as to the scope of this basis.

52. The Ministry of Justice adhered to that interpretation of article 27 when presenting a 1987 bill to parliament regarding a Saami representative body: the Saami Parliament (the Sameting).[32] In the Norwegian Parliament, the Judicial Committee stated that Norwegian authorities comply with international law developments when clearly formulating a will to establish a positive special measure in relation to Saami. Furthermore the Judicial Committee attaches great importance to the Ministry's interpretation of article 27, and focused on Norway's obligation to contribute in a positive way to the Saami's material capacity to enjoy their culture and to influence the physical and economic foundation for their form of culture.[33] The Minister of Justice stated in parliamentary debate that a people's right

[30] On the right to fishing in the ocean north of Finnmark, see Norway's Official Reports (NOU) 2008:5 (chair Carsten Smith).

[31] On the legal position of the Saami, see Norway's Official Reports (NOU) 1984:18 (chair Carsten Smith).

[32] Ot.prop (1986-87) No. 33 p.37.

[33] Innst O. (1986-87) No.79 p.5.

to enjoy its culture must today be considered a fundamental human right, and the Minister emphasized that the concept of culture must be understood to include the material basis for cultural practice as well.[34]

53. The following year, in 1988, that view was further strengthened when Parliament adopted a constitutional amendment concerning the protection of Saami culture. The Judicial Committee chairperson stated in Parliament that this constitutional provision corresponds to article 27 obligations, and referred to the interpretation of article 27 regarding States' obligations to give active support to enable the Saami to have the means — including in a material sense — to enjoy their culture and their language.[35]

54. This interpretation of article 27 was recently reinforced in a White Paper on Saami policy from the Government to Parliament.[36] With regard to the concept of culture it states:

> In relation to Saami as Indigenous people it is a common interpretation that the provision also includes the material conditions for the total cultural practice, also referred to as the nature basis of Saami culture.[37]

Furthermore, the White Paper stated concerning the duty of the State to contribute in a positive way to the conditions of the Saami people to enjoy their culture: "It is now a common interpretation that the provision lays foundation for demands on positive measures from the authorities in order to comply with their obligations."[38]

55. The Coastal Fishing Committee concluded, as previously mentioned, that Saami living in the fiords and along the coast of Finnmark had a right to fish which was based on historical use and the rules of international law on indigenous peoples and minorities. That conclusion was based on the international law instruments as described in the international framework above. However, considerable weight was attached in addition to the national evaluation of this material in the law-making process in the 1980s leading up to the establishing of the Saami Parliament and adoption of the constitutional protection of Saami culture. The views expressed by the Norwegian political authorities should be regarded as an important element in interpreting the international instruments with regard to Saami rights as citizens and fishers. There are two other provisions of legal importance to this interpretation: first, the constitutional clause — para.110a of the Constitution about the duty of State authorities to confer on the Saami people the means to secure and develop their culture; and secondly, a statutory provision incorporating into Norwegian law among other conventions the International Covenant on Civil and Political Rights and at the same time giving the convention rules priority in case of conflict with domestic legislation.

Draft statute

56. This right to fish has now been developed in a draft statute both in relation to allowable catches and to exclusive rights in some areas. The people living along coastlines and in fiords off Finnmark were entitled to an allowable catch of a

[34] O.tid. (1986-87) p.496.
[35] St.tid (1987-88) p.3026.
[36] Stortingsmelding No.28 (2007-2008).
[37] Ibid., p.33.
[38] Ibid.

volume that would give a reasonable income for a household, and the people living in the fiords of the county got recognized a preferential right to fishing in their fiord. A regional administration was part of the draft with authority to decide on the size of vessels and the use of fishing equipment in an area 4 nautical miles seaward. That administration was delegated power to give preference to fishing with minor vessels and passive equipment as well as to place special weight on the interests of the fiord and near coastal fisheries. The board of the administration is to be composed of three representatives elected by the Saami Parliament and three from the county council.

57. Coastal Saami residents in the most northern districts intermingle with the non-indigenous Norwegian population. These fishing rights were therefore recognized as collective and district-limited rights, rather than indigenous-specific rights. Non-indigenous Norwegian fishers in Finnmark would therefore also benefit from international law-based rights pertaining to indigenous peoples like the Saami. This solution was, however, supported by the Saami Parliament.

B. Norway's present legal and political situation

58. There is so far no Norwegian jurisprudence of importance with regard to Indigenous fishing rights in the sea. The present as well as the future law is depending on an evaluation of the reasoning and the proposal of the Coastal Fishing Committee report. An extensive hearing throughout 2008 produced a result that may be summarized thus: big trade organizations spoke against the law reform proposal whereas local fishers, the Saami Parliament, Saami organizations and many of the municipalities were positive, either totally or partially, towards the proposal.

59. After a hearing period, however, the Attorney-General released a document that is negative towards the Committee's report, both regarding its international law analysis and its statutory proposal.[39] There was a formal response from the leader of the Coastal Fishing Committee, who also had the main responsibility for the international law section of the report.[40] The principal elements of discussion are Saami rights to the material basis of culture and their rights to necessary special measures. The intervention by the Attorney-General is negligent in its reasoning, according to the Committee leader, because it fails to refer to, among other things, the statements of the Government in the recent White Paper.[41]

60. Regarding the material foundation of culture, the Attorney-General considers it to be at least "unclear" whether this will include indigenous fishing rights in the seas. The answer should be that there is hardly any place where one can speak with more clarity about a material cultural basis than with regard to fishing for the Saami living along the coast in the north. Fishing in the ocean was the precondition for settling down in those local Saami communities and for the parts of Saami culture that developed there.

61. The statement of the Attorney-General which probably will cause the strongest reaction is, however, the view expressed that it is "doubtful" whether article 27 lays the foundation for positive special measures. This is a surprising and negative

[39] Letter of 9 March 2009 to the Fisheries and Coastal Ministry.

[40] Letter of 24 March 2009 to the Fisheries and Coastal Ministry.

[41] See para. 55 above.

intervention concerning Saami rights more generally. Not only is it contrary to what the Government considers to be a common interpretation, but to all intents and purposes those days when Saami rights and policy centred mainly on questions of eliminating negative discrimination are now past. Saami rights and policy are now about recognizing special arrangements in order to promote real equality in the country.

62. The Minister of Fisheries has in October 2009 publicized the first official reaction to the Committee's report. The Minister will propose certain fishing rights — but far more minor than in the draft — to the Norwegian Parliament, but the Minister will not recognize the international law basis, nor accept the preferential right to fish in the fiords, nor establish any regional administration with special powers and with Saami Parliament-elected members of the board. According to the established rules concerning consultations between the Government and the Saami Parliament, the governmental position will now be a basis for such consultations. The Saami Parliament will probably fight for a result that better approximates the original draft statute, and especially for the recognition of the international law basis.

C. Nordic Saami Convention (Nordisk Samekonvensjon)

63. A draft Nordic Saami Convention, prepared by a joint Finnish-Norwegian-Swedish-Saami group of experts, was presented in 2005.[42] Shortly thereafter, the draft was adopted by the Saami Parliament in all 3 countries. It is currently being considered by the three Governments.

64. The purpose of the Convention is to develop a legal basis for the Saami as a separate people, regardless of whether individual Saami live in or are citizens of one or another of the 3 States. The Convention will establish a pan-Saami law, and is a foundational document covering the fundamental rights of the Saami people as well as Saami governance, Saami languages and culture, Saami rights to land and water, and Saami livelihoods. The provisions concerning rights to inland water areas and the use of water areas shall apply correspondingly to Saami fishing and other use of fiords and coastal seas. In the negotiations concerning implementation of the Convention, the more detailed rules will certainly be harmonized with the result of the Norwegian statute on the indigenous fishing rights in the seas.

V. Concluding observations

65. Australian fisheries management, cultural heritage protection arrangements and land rights legislation subject indigenous offshore fishing rights to complicated layering of jurisdictions between three levels of government, and public, private and industry interests. As with the native title process, ascertaining indigenous marine rights under these regimes can be complex and lengthy owing to necessary negotiations with many stakeholders. However, unlike native title offshore fishing rights, they have the capacity to recognize some indigenous-specific interests as exclusive rights to fish in offshore waters, subject only to international rights of

[42] Nordisk samekonvensjon, utkast fra ekspertgruppe 26. october 2005. Nordic Saami Convention, draft of expert group (chair Carsten Smith).

innocent passage. These are stronger offshore rights than any thus far obtained under native title, which, even at the fullest recognition as currently interpreted by the High Court, is subject to additional common law public rights. Litigated native title determinations are a recent body of law and bear added risks of providing limited application beyond peculiarities of litigants or facts, whereas other statutory schemes (e.g., land rights) are well established, arguably providing more certainty. Note, however, that while they currently occasionally result in stronger proprietary rights than native title litigation, they remain distinct from native title and in one sense more tenuous because they stem from rights granted by Parliament rather than indigenous-specific rights that inhere by virtue of survival of British sovereignty and which the common law must recognize.

66. The coastal Saami fishing rights in the seas are a major legal as well as political issue for the Saami people. The historical and international law foundation of these rights has now been documented with a positive conclusion by a Government-appointed committee, whereas this conclusion is being criticized by the Attorney-General. There shall now be consultations between the Norwegian Government and the Saami Parliament. For the coastal Saami, fishing is essential for the continuation of settlements in their local communities, which lights many houses in the dark nights up north. These communities are also essential for securing Saami culture, which is in a critical state of existence. The future of this culture is thus dependent on recognition of fishing rights, now an issue in national legal and political debates. A view expressed by the Permanent Forum might have an impact in this regard.